

NOV 30, 2004
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA
BY /s/ KF DEPUTY

Friendly House, *et al.*,
Plaintiffs,
v.
Janet Napolitano, *et al.*,
Defendants.

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CV 04-649 TUC DCB
ORDER

On November 2, 2004, a majority of voters of the State of Arizona approved Proposition 200, a ballot initiative intended to require employees of the state or local governments to (1) verify the immigration status of applicants for state and local public benefits, and (2) report to federal immigration authorities any applicant for benefits who is in violation of federal immigration law. Proposition 200 further subjects a government employee to criminal prosecution for any failure to report discovered violations of federal immigration law. Proposition 200 will become law when Defendant Napolitano, Governor of the State of Arizona, issues her proclamation. Ariz. Const. art. IV, pt. 1, § 1(5). Defendant Napolitano is apparently prepared to issue her proclamation regarding Proposition 200 tomorrow, December 1, 2004.

1 To obtain a temporary restraining order ("TRO") in the Ninth Circuit, the moving
2 party is required to show: (1) a probability of success on the merits combined with a
3 possibility of irreparable harm if the relief is denied; or (2) serious questions are raised and
4 the balance of hardships tips sharply in favor of the moving party. *Tillamook County v. U.S.*
5 *Army Corps of Engineers*, 288 F.3d 1140, 1143 (9th Cir. 2002). Rather than being alternatives
6 or separate tests, the aforementioned tests are "extremes of a single continuum." *Id.* Hence,
7 "the greater the relative hardship to the moving party, the less probability of success must be
8 shown." *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999)
9 (Citations omitted).

10 In the present case, Plaintiffs have raised "serious questions" regarding Proposition
11 200. First, there are "serious questions" regarding whether or not Proposition 200 is
12 preempted by federal law. Second, there are "serious questions" regarding whether or not
13 Proposition 200 passes constitutional muster. Additionally, the balance of hardships tips
14 sharply in favor of Plaintiffs. It seems likely that if Proposition 200 were to become law, it
15 would have a dramatic chilling effect upon undocumented aliens who would otherwise be
16 eligible for public benefits under federal law. For instance, an undocumented alien who is
17 eligible for public benefits might refrain from availing himself of those benefits out of fear
18 of the implications of Proposition 200. As for the Defendants, as was candidly admitted
19 during oral argument, they would not suffer any tangible harm if the TRO were granted.

20 This Court finds itself in an extremely undesirable position. On the one hand, a
21 majority of Arizona voters cast their ballots in favor of Proposition 200 and this Court is
22 loathe to disregard their decision. On the other hand, this Court is obligated to uphold the
23 Constitution of the United States, even when to do so stands in opposition to popular opinion.
24 Compounding matters is the fact that, despite the obvious significance and enormity of this
25 matter, this Court is expected to render an informed and intelligent decision in a matter of
26 hours. It seems to this Court that a matter as important and with such potential ramifications
27 as Proposition 200 requires and deserves time for thoughtful deliberation.

1 With that in mind, this Court will grant the Plaintiffs' requested TRO. In doing so, this
2 Court merely delays implementation of Proposition 200. This Court's decision to grant the
3 TRO should not be construed in any way as a comment on the merits or legality of
4 Proposition 200; this Court simply lacks sufficient information at this time to reach any such
5 conclusion. Rather, granting the TRO will maintain the status quo and grant the parties time
6 to brief the important legal issues and permit this Court the opportunity to give this matter
7 the consideration it deserves. If this Court denied the TRO, Plaintiffs would serve Defendants
8 with their motion for preliminary injunction, the matter would be briefed, and there would
9 be a trial. In the meantime, Proposition 200 would become law and it would be implemented,
10 but under the specter that it might be preliminarily enjoined sometime in the future. Such
11 uncertainty would benefit no one.

12 As for the matter of a bond or other type of security, according to the Rule, a TRO
13 may not be issued without imposition of a bond or other security upon the applicant. Rule
14 65(c), Fed.R.Civ.P. The district court, however, has wide discretion in setting the amount of
15 the bond. *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878,
16 882 (9th Cir. 2003). In fact, the amount may be set at zero if there is no evidence the adverse
17 party will suffer damages from the injunction. *Id.* There was no evidence Defendants would
18 be damaged by the TRO, and a bond or security will not be required.

19 **Accordingly,**

20 **IT IS ORDERED** that Plaintiffs' Application for Temporary Restraining Order
21 (document) is **GRANTED** and Defendants are temporarily enjoined from implementing
22 Proposition 200.

23 **IT IS FURTHER ORDERED** Defendants **SHALL** file their response to Plaintiffs'
24 "Application for Temporary Restraining Order and Order to Show Cause Re Preliminary
25 Injunction," **no later than 5:00 P.M., Monday, December 13, 2004.**

26 **IT IS FURTHER ORDERED** that, pursuant to Rule 65(a)(2), Fed.R.Civ.P., an
27 evidentiary hearing on Plaintiff's request for Preliminary Injunction will occur at **1:30 P.M.,**
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1 **Wednesday, December 22, 2004**, in Courtroom 6B, Sixth Floor, Evo A. DeConcini United
2 States Courthouse, 405 W. Congress Street, Tucson, Arizona, **to last no more than one**
3 **hour**. Absent objection from Defendants, this temporary restraining order will not expire
4 until 5:00 P.M. on December 22, 2004.

5 **IT IS FURTHER ORDERED** that the parties shall be prepared to submit only
6 evidence that is relevant and material to this Court's determination of Plaintiff's request for
7 preliminary injunctive relief.

8 **IT IS FURTHER ORDERED** that Plaintiffs, upon receipt of this Order, shall
9 immediately fax a copy of this Order to each of Defendants' counsel.

10 **IT IS FURTHER ORDERED** that Plaintiffs **SHALL immediately** serve all
11 Defendants with the pleadings filed with this Court.

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13 **DATED** this 30th day of November, 2004.

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15
16 /s/ David C. Bury
17 David C. Bury
18 United States District Judge
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